

Matter of AJG Parkview Corp. v Calabrese
2017 NY Slip Op 33269(U)
April 12, 2017
Supreme Court, Nassau County
Docket Number: 605226/15
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

In the matter of the Petition of AJG Parkview Corp., Individually and as a member and creditor of PARKVIEW AT SALISBURY, LLC,

TRIAL/IAS, PART 1
NASSAU COUNTY

Petitioner,

INDEX No. 605226/15

MOTION DATE: 03/14/17
Motion Sequence # 005, 006

-against-

JAMES CALABRESE, individually and as a member of PARKVIEW AT SALISBURY, LLC, CALABRESE BROS. DEVELOPMENT CORP., BREEZE BROS. ALUMINUM & VINYL SIDING CO., INC., CALABRESE, BROTHERS CONSTRUCTION CO., JOHN DOE 1-5, XYZ CORP., and JAMES MARKOTISIS,

Respondents.

For judicial dissolution of PARKVIEW AT SALISBURY, LLC, pursuant to Article VII of the New York State Limited Liability Company Law, with ancillary relief including surcharge and damages against Respondent(s), and an Order (s) pursuant to Article 10 of the New York Debtor & Creditor Law setting aside and/or disregarding and levying upon fraudulent conveyances(s) by Respondents.

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The following papers read on this motion:

Notice of Motion.....	XX
Affirmation in Support.....	XXX
Affirmation of Receiver.....	X
Affirmation in Opposition.....	X

Motion by Receiver Gerard Fishberg, Esq. to confirm the receiver’s final accounting, award commissions, distribute funds, and discharge the receiver is **granted**. Cross-motion by plaintiff AJG Parkview Corp. to stay distribution of the net profits of Parkview at Salisbury, LLC, pending determination of the appeals from the parties’ summary judgment motions in the related action Calabrese v AGJ Parkview Corp. Index No 602920 is **denied**.

This action arises from a dispute between the members of a limited liability company. Plaintiff in action # 1 James Calabrese owned a parcel of real property in Westbury on which he planned to develop a 30 unit condominium project through his limited liability company, Parkview At Salisbury LLC. Because Calabrese was in need of financing, he admitted defendant AJG Parkview Corp. as a 50% member of Parkview At Salisbury in exchange for AJG’s agreement to make a capital contribution to Parkview At Salisbury of \$1,500,000.

Pursuant to Sec 5.1 of the operating agreement dated July 18, 2013, AJG Parkview was to make an “initial capital contribution” of \$1.5 million to Parkview at Salisbury, which was to be used to repay the existing mortgages on the property, totaling \$1,267,388, closing costs of the operating agreement, and construction costs (Index No 603044/15 Dkt 76 at 23). Pursuant to Sec 4.7, AJG Parkview was to have “exclusive control” over the company’s bank accounts. Calabrese was to be the managing member of Parkview At Salisbury, and Calabrese’s construction company, Calabrese Bros Development Corp., was to perform the construction management work.

The project was to be completed in three phases: first building (8 units); second building (14 units); and third building (8 units). Pursuant to Sec. 7.1[c] of the operating agreement, the first \$1.5 million of “Extraordinary Cash Flow” was to be held as “reserves” to pay costs of construction of phase 2. Under Sec 7.1.(b), “Extraordinary Cash Flow” was defined as cash proceeds of a “Capital Transaction”, increased by interest payments on such proceeds, and decreased by expenses of the capital transaction, debt payments, indemnity payments, and reserves established pursuant to Sec. 7.1[c]. “Capital Transaction” was defined in Sec. 1.1 as refinancing or sale of any units in the project.

Schedule 3.7, “Parkview at Salisbury Business Plan,” provides that “The goal is to have AJG Parkview and Marie Holdings paid in full, including all principal, interest and fees,

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upon the sale of the 22 units that make up phase 1 and phase 2. The cost to build phase 3 (8 units) will be paid for by James Calabrese and AJG Parkview will have no responsibility or obligation on Phase 3.” According to AJG Parkview, the proceeds of the sale of phase 2, and any excess over the \$1.5 held in reserve from the proceeds of phase 1, were to be used for “returns” to AJG Parkview and then to fund construction of phase 3.

The operating agreement defines “first preferred return” as “a return to Capital Member [i.e. AJG Parkview] in an amount equal to 83.333% of such Capital Contribution” (Index No 603044/15 Dkt 76 at 5). Additionally, the operating agreement defines “second preferred return” as “a return to the Capital Member [i.e. AJG Parkview] equal to 12% per annum, compounded monthly, on such capital contribution, which shall start to accrue commencing on the first anniversary date of such capital contribution” (Id at 9). However, section 5.9 of the operating agreement provides that “No interest shall be paid on any capital contribution to the company by any member.”

Sec 7.2 of the operating agreement entitled “Distribution of operating cash flow and extraordinary cash flow,” provides that loans owed to creditors must be paid before any capital may be returned to members, or the first or second preferred returns paid to AJG. Sec. 7.2 of the operating agreement further provides that interest and principal on loans were to be paid first, then creditors, then loans from members, and then the first and second preferred returns referred to above (Id at 28). Sec. 7.2 provides that, with respect to distribution of cash flow, Calabrese was to be last in order of priority. Sec. 11.13 provides that in litigation between the members, the prevailing member shall be entitled to reasonable attorney fees.

It appears that AJG Parkview made the \$1.5 million capital contribution by AJG’s principal, Anthony Galeotafiore, guaranteeing a loan from Marie Holdings to Parkview at Salisbury in that amount. In any event, on April 23, 2014, the lender, Marie Holdings, Inc., served Parkview at Salisbury with notice of default. It appears that the defaults included commencing work on phase 2 before phase 1 was completed. On April 25, 2014, AJG Parkview served Calabrese with notice of default under the operating agreement. AJG claimed that Calabrese was in default for prematurely commencing work on phase 2 and also failing to pay subcontractors. It appears that the fundamental dispute between the parties is that Calabrese began construction of phase 2 before phase 1 was complete. AGJ Parkview further alleges that around September 2014 Calabrese began entering into contracts for phase 3, although phase 2 was not yet complete. In the April 25 letter, AJG purported to terminate the construction management agreement.

On May 21, 2014, AJG Parkview Corp. entered into an agreement with James Calabrese and Calabrese Bros Construction Company (Index No 603044/15 Dkt 112). The

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agreement provides that AJG Parkview was to contribute \$650,000 to Parkview at Salisbury to complete the construction work, pay amounts currently due Calabrese Bros Construction, and other costs. Between May 2014 and April 2015, AJG Parkview made an additional capital contribution of \$1,152,000, for a total \$2,652,000 investment. On February 3 and March 19, 2015, AJG Parkview withdrew funds totaling \$748,600, allegedly towards its "first preferred return." At bottom, the parties' dispute centers upon the interpretation of the terms "first preferred return" and "second preferred return" as used in the operating agreement.

On May 11, 2015, Calabrese commenced an action against AJG Parkview (Index No 602920/15). Calabrese alleged that AJG Parkview interfered with the day-to-day operations of Parkview at Salisbury and wrongfully withdrew funds from the company. In the first cause of action, Calabrese sought an order removing AJG Parkview as a member of Parkview at Salisbury for cause. In the second cause of action, Calabrese sought to set aside the operating agreement as an adhesion contract. In the third cause of action, Calabrese sought to set aside the operating agreement as unconscionable. In the fourth cause of action, Calabrese sought damages for breach of fiduciary duty. In the fifth cause of action, Calabrese sought damages for breach of the operating agreement. Calabrese's second and third causes of action were dismissed by order dated August 24, 2015. Calabrese's first, fourth, and fifth causes of action were dismissed by order dated August 22, 2016.

In its answer, defendant AJG Parkview asserted four counterclaims. The first counterclaim is for breach of the July 2013 operating agreement by failing to make distributions to AJG Parkview. The second counterclaim is for a declaratory judgment as to AJG Parkview's rights under the July 2013 and May 21, 2014 agreements. The third counterclaim is for breach of fiduciary duty by disloyalty, self-dealing, and looting. In the fourth counterclaim, AJG Parkview incorporates its claims in Index No 603044/15, as well as its claims in Index No 605226/15, a proceeding for the judicial dissolution of Parkview at Salisbury, LLC (see below).

On May 25, 2015, AJG Parkview commenced Index No 603044/15 against Parkview at Salisbury, Calabrese Bros Development Corp., and James Calabrese. In the first cause of action, AJG Parkview seeks a declaratory judgment that the reserve requirement of Sec. 7.1[c] of the operating agreement applies to all costs of construction. In the second cause of action, AJG seeks a declaratory judgment terminating the construction management contract for willful misconduct. In the third cause of action, AJG seeks an accounting with respect to the affairs of Parkview at Salisbury. In the fourth cause of action, AJG seeks a declaratory judgment that it is the prevailing party entitled to attorney fees. In the fifth cause of action, AJG seeks damages for breach of fiduciary duty. In the sixth cause of action, AJG seeks damages for breach of the implied covenant of good faith and fair dealing. The seventh cause of action is for breach of the operating agreement. The eighth cause of action is for

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breach of the May 2014 agreement. In the ninth cause of action, AJG seeks to impose a constructive trust upon Calabrese's interest in Parkview at Salisbury.

By order dated June 30, 2015, the court issued a preliminary injunction, restraining Parkview at Salisbury and Calabrese from making any distributions or payment of funds from the closing attorney's escrow account without the signature of both members of Parkview at Salisbury, except for payments in the ordinary course of business.

On August 13, 2015, AJG Parkview commenced a proceeding for the judicial dissolution of Parkview at Salisbury, LLC. On August 24, 2015, Gerard Fishberg, Esq. was appointed as receiver of Parkview at Salisbury, LLC.

By order dated September 1, 2016, defendant Calabrese's motion for an order directing the receiver to pay defendant Breeze Bros. Aluminum & Vinyl Siding Co., Inc. for work performed on the project was granted to the extent of \$162,401.04. The court determined that Breeze Bros' request for a construction management fee in the amount of \$168,593.75 should await a determination of the profit on the project.

By order dated December 7, 2016, the court, upon reargument, granted plaintiff's Calabrese's motion for summary judgment to the extent of declaring that, following the sale of the last condominium unit and the receiver's final accounting, defendant AJG Parkview would be entitled to the return of its capital contribution of \$2,652,000. Any remaining profit was to be distributed to the members of Parkview At Salisbury LLC on a 50-50 basis.

Limited Liability Company Law § 503 provides that the profits and losses of a limited liability company shall be allocated among the members in the manner provided in the operating agreement. If the operating agreement does not so provide, profits and losses shall be allocated on the basis of the value of the contributions of each member (Id). Allocation of profits need not be in proportion to monetary contributions (McKinney's Practice Commentary 7.2).

Similar to shareholder agreements, courts must generally enforce operating agreements, governing limited liability companies, according to their terms. Such agreements avoid costly, lengthy litigation and promote reliance, predictability, and definitiveness in relationships among the members of limited liability companies (**Matter of Penepent Corp.**, 96 NY2d 186, 192 [2001]).

When interpreting the Limited Liability Company Law, or the terms of an operating agreement, analogies may be made to both corporations and partnerships (McKinney's Practice Commentary 1.3). By analogy to a partnership, the members of a limited liability company do not receive interest on their capital contributions, unless there is an express

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provision for interest in the operating agreement (Partnership Law § 40(4); **Sutton v Burdick**, 135 AD3d 1016, 1019 [3d Dept. 2016]).

In defining “first preferred return,” the operating agreement does not speak of a return “on capital,” but rather a return “of capital” to the capital member. Similarly, the definition of “second preferred return” speaks of a return to the capital member. While the second preferred return is to be calculated at 12% per year, and compounded monthly, it does not expressly refer to interest being paid on the member’s capital contribution. Thus, the court concluded that the first and second preferred returns were intended to provide for a return of capital to the capital member, and that after AJG received the return of its \$2,652,000 investment, the remaining profit on the venture was to be split on a 50-50 basis.

The problem with this interpretation of the operating agreement is that it allows for no value to the real property which Calabrese contributed to Parkview at Salisbury LLC. Construing the July 2013 operating agreement and the May 2014 construction agreement together, the court determines that, after paying Breeze Bros.’ construction management fee of \$168,593.75, the balance of the funds, after payment of the receiver’s commissions and counsel to the receiver’s fee, should be distributed to the members on a 50-50 basis.

CPLR § 8004 provides that a receiver is entitled to commissions, not exceeding 5 % “upon the sums received and disbursed by him,” as the court by which he is appointed allows. The receiver’s commissions are to be calculated based upon the total sum “passing through the receiver’s hands” (**Gasser v Infanti Int’l**, 358 F. Supp. 2d 176, 180 [EDNY 2005]). The burden is on the receiver to justify his commissions (Id at 181).

Over the course of eighteen months, the receiver has overseen the completion of the development and marketing of this 30-unit condominium project. The receiver has made payments to outside contractors, maintenance personnel, utilities, real estate brokers, and taxing authorities. The receiver obtained insurance for the property, oversaw the discharge of a mechanic’s lien, ensured that partnership tax returns were filed, and attended numerous court conferences. Additionally, the receiver communicated extensively with the Attorney General concerning amendments to the offering plan. The receiver also communicated with outside counsel; Forchelli, Curto; in connection with amendments to the offering plan. Thus, the court concludes that the services provided by the receiver were invaluable to the satisfactory completion of the condominium project.

According to the receiver’s final accounting, there is \$5,815,020.77 in the receiver’s account. The court awards the receiver a commission of \$321,971.27, based upon just under 4.9 % of the \$6,579,423.61 which came into the receiver’s hands. The court awards counsel to the receiver a fee of \$22,050.00, which was agreed to by the parties. Thus, the total for distribution to the members is \$5,470,999.50. Deducting the construction management fee

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of \$168,593.75, payable to Breeze Bros, leaves a net amount for distribution of \$5,302,405.75. This sum is to be distributed \$2,276,902.87 to AJG Parkview Corp. and \$3,025,502.87 to James Calabrese (\$2,276,902.87 plus \$748,600 to offset prior distribution to AJG). These sums are net of all claims by the members against each other.

The receiver's final accounting is confirmed, and upon payment of these funds, the receiver is discharged. Any arguments not addressed herein are deemed to be without merit.

So ordered.

Date: APR 12 2017

Stephen A. Secaria

J.S.C.

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ENTERED

APR 13 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE